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IN THE
SUPREME COURT OF THE UNITED STATES

No. 71-1163

HERMAN EUGENE WING,
Petitioner,

vs.

STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE
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No. _____

HERMAN EUGENE WING,
Petitioner,

vs.

STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Your Petitioner, Herman Eugene Wing, prays that a writ of certiorari issue to review judgment of the Court of Criminal Appeals of the State of Oklahoma, entered in said case on December 10, 1971.

OPINIONS BELOW

The judgment of the District Court of Tulsa County, Oklahoma, is not reported. The opinion of the Court of Criminal Appeals, State of Oklahoma as reported at _____
_____.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on the 17th day of November, 1970. That the Petitioner filed his petition for rehearing on the judgment and sentence rendered against him on the 17th day of November, 1970, which was heard and overruled by the Court of Criminal Appeals of the State of Oklahoma, on December 10, 1971. The jurisdiction of this Court is invoked under Title 28 U.S.C.A., Section 1257-3 and the rules of the Supreme Court, Rule 19.

QUESTIONS PRESENTED

PROPOSITION I.

DID THE APPELLANT COURT HOLDING INADMISSIBLE EVIDENCE, WHICH WAS INTRODUCED IN THE TRIAL COURT, TO BE HARMLESS ERROR.

PROPOSITION II.

DID THE TRIAL COURT ERR IN DENYING PETITIONER'S MOTION FOR INSPECTION OF EVIDENCE AND REPORTS PERTAINING THERETO.

STATEMENT OF FACTS

On the night of November 5, 1969, at approximately 11:45 P.M., two men entered the Harvard Bridge Club, Tulsa, Oklahoma, where a poker game was in session, by breaking through a glass curtained door. There were six or seven persons present who corroborated the chief prosecuting witness, Oakley's, testimony. One man was holding

a '45' automatic; the other man was holding a double bitted axe, which apparently had been used to break down the door. The man with the '45' automatic told Mr. Oakley to give him his money and then to lie face down on the floor which he did. The witness, Oakley, stated that he did not see anything else that took place except that he heard a shot fired but by whom he did not know and that $455.00, which was in $5.00 denominations was taken from him by the man with the '45' automatic. Oakley further testified that he had known the Defendant, Wing, for ten or twelve years and that to his knowledge, he did not see the Defendant that evening. Officer Cartner testified that he arrived at The Harvard Bridge Club at 11:59 P.M. on the 5th day of November, 1969, and upon his arrival, he observed the glass in the front door to be broken. That he, Officer Cartner, took his hand and pushed the curtain back and observed two men in dark clothing with masks on their faces and guns in their hands. This observation was just for a matter of seconds. Two other police officers, Leamons and Cobb, Leamons had proceeded to the rear of the Harvard Bridge Club, and Cobb had come to the assistance of Cartner, but later dispatched himself to the rear of the Harvard Bridge Club to assist Leamons. After Officer Cobb had started to the rear, several shots were heard by him, Officer Cobb, and a person came through the front door and two shots were fired by Officer Cartner which proved fatal to one S. E. Powell, who was dressed in a dark overcoat and had a mask on his face. The amount of money testified to have been taken in the robbery by the prosecuting witness, Oakley, was found on the person of S. E. Powell who had been fatally wounded by Officer Cartner.

Officer Cartner observed the two alleged robbery suspects for three to five seconds and could accurately state what type of clothing, even to the shoes, both men were wearing. None of the alleged robbery victims could identify either suspect. It would be voluminous to set this out in the statement of facts but the testimony of witnesses Wall, Oakley, Compton, Rhoades, Berryman, Winters, Baldwin and Vann. Officer Leamons testified that upon entering the back of the Harvard Bridge Club, that he heard a shot and observed two men come out the back door of the Harvard Bridge Club and both then wore masks. That a shot was fired and that one of the men turned and went back through the door that he had previously left.

That the other masked man ran in an easterly direction; that Officer Leamons fired at the fleeing person twice and Officer Cobb, who had just rounded the corner of the building, fired also. That the mask of the now running man in an easterly direction, had slipped and he had a glimpse of the person for two or three seconds whom he identifed as the person of Herman Eugene Wing. The description of Officer Leamon's view of Herman Eugene Wing is set forth from pages 186-189 of the case-made. Officer Cobb testified that he first observed the person of Herman Wing when he rounded the corner of the building going to the back of the Harvard Bridge Club and that while Officer Leamons stayed at his post, he chased the person seen fleeing but did not apprehend that person but arrested one Charles Vann and placed him under arrest for suspicion of armed robbery and turned him over to Officer Leamons. He then returned to the area from which he had seen a person fleeing and found a

pistol later described as a German Luger. Officer Cobb identified the person of Herman Wing, whom he glimpsed for two or three seconds, as he (Wing) was facing Officer Leamons. Officers Fred Wolf and Charles Holt testified they arrested Herman Wing at 12th and Harvard Avenue, Tulsa, Oklahoma, approximately two blocks from the scene of the robbery at 2:00 A.M. on the morning of the 6th day of November, 1969, lying face down in a ditch beside a road, and at that time, he was dressed in a three-quarter length coat, cowboy boots, that he was taken to the Tulsa Police Station and booked for armed robbery. Officer Ray Goodenough, an identification man from the Tulsa Police Department, testified as to recovery of a German Lugar pistol, a spent 9 mm slug, one '45' automatic pistol found at the back door of the Harvard Bridge Club, one hat and one axe. That a short time later, an automobile was searched just west and south of the Harvard Bridge Club on Gary Avenue which contained a traffic ticket for one Herman Wing and that the car was processed for finger prints. Also a Scotch liquor bottle and sun glasses were found in the automobile. This, with all the other evidence, seized was forwarded to the Federal Bureau of Intestigation for processing and identification. Three FBI agents testified at the time of trial; one a ballistics expert who stated that the German Luger found in a yard distant from the Harvard Bridge Club, was the same that fired the spent slug found in the Harvard Bridge Club. A fingerprint expert testified that a partial print found on the clip of the German Luger pistol matched that of the person of Herman Wing and a chemical expert who testified that blood stains found on the clothing of Herman Wing was of type "A" which was the same type of blood as that of one of the robbery victims, Paul Compton, not

Fred Oakley, the prosecuting witness, nor the person of Herman Wing.

Prior to trial, the Petitioner had filed his motion for inspection for production of evidence and laboratory analysis made in connection thereto; that at the date of trial, the trial judge overruled. Petitioner's motion for inspection and production and the case proceeded to trial wherein the Petitioner was found guilty from which judgment and sentence, he is appealing to this Honorable Court.

PROPOSITION I.

ERROR OF THE APPELLANT COURT HOLDING INADMISSIBLE EVIDENCE INTRODUCED IN THE TRIAL COURT, TO BE HARMLESS ERROR.

In the case at bar as set forth in the Statement of Fact, a short time after the robbery occurred, a parked automobile was searched which contained a traffic ticket for the Petitioner herein and that the car was processed for fingerprints. That the fingerprints belonged to the Petitioner and there were fingerprints of one S. E. Powell, deceased, who was shot during the armed robbery. A timely objection was made as this was the only evidence that would tend to instill in the jurors' minds that the Petitioner and S. E. Powell were acting as joint-participants in the armed robbery. The appellant court, when this matter came to their attention, found that the evidence was inadmissible but that it was harmless error and did not require reversal of the conviction. By the Appellant Court's own admission and by virtue of *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081; the argument must be

examined in the light of the Federal law as in *Fahy v. Connecticut*, 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171; *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705. In *Fahy*, supra, the test was posed in this language:

> "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

In *Chapman* the Court, explaining *Fahy*, said:

> "There is little, if any, difference between our statement in Fahy v. Connecticut about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

This rule of reasonable doubt to the second power operates as one of a group of rules governing the judicial process. The function of that process is to appraise the evidence which is available to the prosecution both in fact and in law and to determine whether there is a requisite quantity of it to warrant a verdict of guilty. Under this process it is not the fact of the defendant's innocence which entitles him to be acquitted; but the fact that the evidence of his guilt does not measure up to the proscribed standards. Subordinate to this principal right are other rights which grow out of the laws governing the process. Thus, in Oklahoma a defendant has:

a. The right to a trial by a jury.

b. The right to have the jury chosen in a more or less random fashion. The right to random selection vests in the defendant a right to have on his jury such dull minds as the gods of chance may provide for him.

c. The right to be found guilty only by the unanimous verdict of the twelve persons on the jury. This right embraces the right to have the independent judgment of each individual juror.

d. The right to the presumption of innocence which continues until guilt has been shown beyond a reasonable doubt. A defendant is entitled not to be convicted if the mind of the dullest of the jurors formulates a doubt which to it seems reasonable. The right is to the thought process of that dullest mind and the courts may not substitute any other thought process.

To summarize a constitutional error in the admission of evidence is harmless under *Fahy* and *Chapman* only if it can be said that there is no reasonable possibility that illegally admitted evidence did not overcome in the mind of the dullest juror a doubt which that mind might have conceived to be reasonable.

As stated by Justice Harlin concurring in *Bumper v. No. Carolina*, 391 U. S. 543, 20 L. Ed. 797, 88 S. Ct. 1788:

> "I do not think this can be said here. The critical question was the identity of the perpetrator of these crimes. The State introduced eye-witness identification of petitioner by his two victims, and a gun with which there was evidence these victims were shot, together with testimony that it had been found in petitioner's place of abode. The jury could, of course, have found

> the testimony of the victims credible beyond a reasonable doubt, and convicted petitioner on this basis alone. *But it might well not have.* The addition of a tangible cross-check linking petitioner with the crime can hardly be said, from the judicial vanage point, to have been harmless surplusage."

In the case at bar, it should be noted that there were eight witnesses who were in the Bridge Club at the time the club was robbed and not one of them could identify Petitioner as being a party to the crime. The only people identifying Petitioner were police officers who arrived at the scene as the robbers were fleeing from the scene of the crime. Two of these officers identified Petitioner after a glance of from three to five seconds and the other officer identified the appearance of the Petitioner as to clothing with a three to five second glance. The Petitioner was apprehended some two hours later. The only evidence that links Petitioner to the deceased robber, S. E. Powell, was evidence secured from the automobile and held inadmissible by the Appellant Court. To say that this type evidence could have been harmless surplusage goes beyond the standards which have heretofore been set forth by this Honorable Court as stated in the *Chapman*, supra. That the reviewing Court must be satisfied beyond a reasonable doubt that the error did not contribute to the Petitioner's conviction. To allow such testimony was error. As stated in *Sanden v. U. S.*, 206 F. 2d 86:.

> "Where evidence which is so prejudicial to an accused is erroneously admitted and cannot with reasonable certainty be shown that the harm has been undone, the conviction must be reversed."

In *Fishwich v. U.S.*, 67 S. Ct. 224, 329 U.S. 211, 91 L. Ed. 196:

"If an error in a criminal case has substantial influence on the result or if there is doubt about it, the conviction cannot stand even if supported by the evidence."

The testimony for determining whether error is prejudicial is set out in *Kotteakos v. U.S.*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1559:

"The error is prejudicial unless the reviewing court can say with assurance that the judgment by the jury was not swayed by the error."

As stated in *U.S. v. Dresser*, 112 F.2d 972:

"It is inconsistent without traditional conception of a fair trial to permit any information to go to a jury which might influence a jury to convict a defendant for any reason other than that he is guilty of the specific offence with which he is charged."

"In the trial of a criminal case, a high and important duty and responsibility are imposed on the prosecuting attorney. It is his duty to see that the Government's case is properly presented with earnest and vigor, and to use every legitimate means to bring about a just conviction but he has the duty to refrain from improper methods calculated to produce a wrongful condition and while he may strike hard blows he may not strike foul ones."

As stated in *Berger v. U. S.*, 55 S. Ct. 629, 295 U. S. 78, 79 L. Ed. 1314:

"A Defendant accused of crime is entitled to a fair and impartial trial."

It should be further noted that further evidence which was held inadmissible by the Appellant Court was introduced to show the blood type of the Petitioner and evidence introduced to show that the type of blood on Pe-

titioner's clothing was identified as being the same type as one of the robbery victims and not the Petitioner but again the Court held that the evidence was harmless error even though inadmissible. Not to be redundant, this again links the Petitioner to participation in the robbery by the identifying blood on his clothing with that of one of the robbery victims and the argument heretofore set forth would be the same as to the admissibility and persuasiveness which would have influence on the jury as to his guilt or innocence.

It is the Petitioner's contention that the introduction introduced had a significant value wherein the evidence connected the Petitioner with the deceased, S. E. Powell, who was killed at the scene of the robbery and the introduction of such evidence therefor had a substantial bearing on their finding the Petitioner guilty as charged.

PROPOSITION II.

ERROR OF THE TRIAL COURT IN DENYING PETITIONER'S MOTION FOR INSPECTION AND PRODUCTION OF EVIDENCE IN THE PROSECUTIONS POSSESSION.

The Petitioner, approximately three weeks before trial, filed his motion for inspection and production of evidence asking for the results of any laboratory analysis which might have been procured from the arrest of the Petitioner or of any evidence seized at the scene of the crime. See appendix (b). This was overruled by the trial court and the Petitioner accepted thereto. Some of the main points

of evidence connecting the Defendant with the robbery in the case at bar resulted from testimony and lab analysis produced by the Federal Bureau of Investigation consisting of ballistics, fingerprints, and blood type analysis from evidence seized from the Petitioner and found at the scene of the crime. The Petitioner was unable to properly prepare his defense in the case at bar and to proprly cross-examine the expert witnesses produced by the prosecution because of the fact the analytical reports were not made available to him prior to trial time wherein he could properly prepare his defense and have expert witnesses available for his defense to repudiate testimony given on and behalf of the Federal Bureau of Investigation. The Appellant Court refused to reverse on the grounds there was mere speculation on the Petitioner's part asking for a pre-trial disclosure. This is not so in the case at bar because of the fact Petitioner was aware that a gun was taken from the scene of the crime; that blood was on his clothing. The Appellant Court also stated that Petitioner did not ask for a continuance on the basis of the denial of an inspection nor did he seek an extraordinary writ before trial. Petitioner notes that his motion was filed three weeks prior to trial, the trial court failed to set the motion for hearing before the trial date and Petitioner also states that overruling a motion of this type that it is not mandatory that Petitioner seek an extraordinary writ but that the overruling of his motion would still not deny him the right to bring it to the Appellant Court's attention on appeal and that he preserved his right by specifically bringing same to the appellant court's attention on the perfection of his appeal. It is a well settled rule in the Federal system that the defense under the rules of criminal procedure is entitled to certain evidence

so that it may properly prepare a defense. It is the Petitioner's belief that in any criminal case, the Petitioner should be able to inspect the evidence that has been seized from him and from the fruits of the crime in order he may properly prepare his defense and for to have his own witnesses examine such evidence and give their expert testimony, the same as allowed the State.

The belief that the criminal trial should be a balanced contest between adversaries has long been criticized as a "sporting theory of justice" which is particularly inappropriate in light of the high stakes involved in criminal litigation. The "sporting theory" appears to embody two concepts; equal opportunity to prevail in the litigation and wide latitude for skillful trial maneuvers. Any suggestion that the State must have at least as good a chance as the defendant to prevail would seem to violate the traditional policy of favoring the defendant in order to avoid conviction of the innocent. Insofar as the sporting theory suggests that broad disclosure is undesirable as an infringement upon the opportunity for ingenuity in the use of trial tactics, it would seem to conflict with the duty of the state's prosecutor to seek results which are in accord with the facts rather than to achieve a record of indiscriminate convictions. If the use of discovery is likely to increase the probability that verdicts will be based on the facts rather than on clever trial maneuvers, its broad use in the criminal area would be desirable.

It is the contention of the Petitioner that to not allow the inspection of such evidence as used in the case at bar is to deprive him of his constitutional right to a fair trial as provided by the Constitution of the State of Oklahoma and the Constitution of the United States.

In the majority opinions of the Court, neither a writ of mandamus nor a writ of prohibition is available to an aggrieved party when there are remedies provided by law available and adequate such as a remedy by appeal from a judgment and sentence and that the Appellant Court's decision that a motion for continuance to give the Petitioner time for an extraordinary writ was erroneous but that the Petitioner should have been allowed or granted the Prosecution's laboratory analysis submitted them by the Federal Bureau of Investigation and not to do so prior to admitting such evidence is error and denied Petitioner his rights as provided by the 14th Amendment of the United States Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that this Court grant this petition for writ of certiorari.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A

Filed in Court of Criminal Appeal, State of Oklahoma, Nov. 17, 1971. Andy Payne, Clerk.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. A-16,013

HERMAN EUGENE WING,
Plaintiff in Error,

vs.

THE STATE OF OKLAHOMA,
Defendant in Error.

SYLLABUS

1. Where the trial court erroneously ruled defendant had no standing to challenge the admission of the fruits of an unreasonable search, if the evidence admitted thereby is merely collateral and does not fatally infect the conviction, and if excluded from consideration would not effect the verdict, reversal of the conviction is not required.

2. A report of the state penitentiary hospital showing an inmate's blood type, identified by the hospital administrator who did not personally make the test nor record it, is inadmissible as hearsay. Since such a report is not required by statute, it is not admissible as a record required to be kept by a public officer.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA,

HONORABLE R. F. MARTIN, JUDGE.

Plaintiff in Error, HERMAN EUGENE WING, was con-

victed for the crime of Robbery with Firearms, After Former Conviction of a Felony. His punishment was fixed at a term of one hundred and five (105) years in the state penitentiary. MODIFIED to a term of forty-five (45) years imprisonment. JUDGMENT and SENTENCE MODIFIED AND AFFIRMED.

THOMAS G. HANLON
TULSA COUNTY, OKLAHOMA,

Attorney for Plaintiff in Error,

LARRY DERRYBERRY, Attorney General
FRED H. ANDERSON, Ass't Atty. General,

Attorneys for Defendant in Error.

Opinion by TOM BRETT, J.
BUSSEY, P. J., Concurs in Results.

BRETT, J.

Plaintiff in Error, Herman Eugene Wing, hereinafter referred to as defendant, was convicted and sentenced to one hundred and five (105) years imprisonment for the crime of robbery with firearms, After Former Conviction of a Felony, in the District Court of Tulsa, County, Case No. CRF-69-1867. Judgment and Sentence was imposed on March 13, 1970, and this appeal perfected therefrom.

Defendant was charged with having robbed William Fred Oakley by threat of firearm on November 5, 1969. The evidence establishes that on November 5, 1969, shortly before midnight, two masked and armed men broke into the glass front door of the Harvard Bridge Club in Tulsa, Oklahoma. Several witnesses present in the Club at the time testified as to the men breaking in, but none saw the faces of the robbers and were not able to identify defendant as one of them.

William Fred Oakley testified he was the manager of the Club and that the robber with a .45 automatic pistol told Oakley to put his hands on a table and surrender his

money. Oakley was then told to lie on the floor where he was unable to see anyone else. Oakley testified approximately $455.00 was taken from him. Oakley further testified he had known defendant for ten (10) to twelve (12) years and did not think either of the robbers was defendant.

Paul Joe Comptom testified as to being present at the time of the robbery during which he was hit on the head and lost a lot of blood. Compton did not see the robbers' faces and could not identify defendant. Compton's blood type was the same as blood stains found on defendant's clothing.

Bobby Baldwin testified that as the robbers broke in the front he ran out the back door into the alley. Baldwin remained in the area and saw two men come out the back door who were ordered to stop by a policeman. One man dropped his gun and went back into the club while the other man ran away exchanging gun fire with the policeman.

Police officer Leamon testified that pursuant to a police broadcast he went to the rear of the Club where he ordered two men to stop. One man ran back inside the Club and the other man ran down the alleyway. Officer Leamon fired at the running man whose mask slipped enabling Leamon to see his face. Leamon identified him as defendant.

Police officer Cobb testified he was also at the rear of the Club and identified defendant as the person who ran from the rear of the Club.

Police officer Cartner testified he arrived at the front of the Club during the robbery and saw the two masked robbers, one carrying a .45 automatic pistol and the other with a P38 German Lugar weapon. After hearing some shots from the rear, one of the men ran through the front door. Officer Cartner fired two shots at the fleeing man, the second of which stuck the man who died as a result thereof. This man was identified as S. E. Powell. Officer Cartner

said that upon seeing defendant after his arrest at the police station he was wearing clothing similar to that of the other robber who escaped.

Officer Wolf and Holt testified they were patroling the area for the man who had been seen running away from the back of the Club shortly after the robbery. They found defendant lying in some tall grass on his stomach in an alley behind a building at 12th and Harvard Streets.

Officer Goodenough testified that in searching the scene he recovered a German Lugar pistol, an axe, a spent nine millimeter slub, and one .45 automatic pistol from the rear of the Club. He also searched an empty 1969 Pontiac parked just west of the Club from which he recovered a traffic citation issued to Herman Wing. A ballistics expert identified the spent shell as coming from the Lugar. Another expert identified finger prints on the Lugar as those of the defendant.

For the defense Barbara Jean Chipman testified defendant had borrowed her car, the 1969 Pontiac found next to the Club, which he was going to loan to S. E. Powell. She further testified defendant was in her lounge in Bartlesville on the night in question until after midnight when they went to her apartment. Once there defendant received a phone call. She and defendant then came to Tulsa. Four other witnesses corroborated that defendant was in the Bartlesville lounge on the night in question.

Defendant testified he borrowed Miss Chipman's car for the use of Powell and that defendant remained at the Club until after midnight. After receiving a phone call at Miss Chipman's apartment saying Powell was in trouble, he drove to Tulsa. Defendant testified he got out of the car about 12th and Harvard streets to look for the car left by Powell. While walking down the alley, defendant states he was arrested and struck by police officers. Defendant further testified he had handled the Lugar previously when Powell had offered to sell it to defendant.

It is defendant's first assignment of error that there was insufficient evidence presented at the preliminary examination to hold defendant for trial. Defendant does not argue this point in any detail and cites no authorities. After reviewing the record we find this contention to be without merit as there was sufficient evidence for the examining magistrate to conclude that a public offense had been committed and that there was reasonable cause to believe defendant guilty thereof. 22 O.S. 1961, § 264. Evidence at the preliminary need not be sufficient to support conviction. *Taylor v. State*, 96 Okl.Cr. 1, 247 P.2d 749 (1952).

It is defendant's second assignment that it was error for the trial court not to grant a change of venue. Defendant does not urge this point with much conviction and does not cite any authorities in support. We find defendant has not sustained his burden to show that there was sufficient pre-trial publicity to present defendant from receiving a fair trial by impartial jury in Tulsa County, and that the vior dire of the jury did not adequately screen out jurors with fixed opinions. See *Shapard v. State*, Okl. Cr., 437 P.2d 565 (1967).

Next defendant contends the trial court erred in failing to suppress several items of evidence. First, defendant contends it was error to admit in evidence articles of clothing worn by defendant at the time of his arrest. Defendant argues his arrest was illegal and thus the clothes were the fruit of an illegal arrest and thus inadmissible. We cannot agree that the arrest was illegal. Although a warrant had not been issued, the officers arresting defendant a short distance from the scene of the crime only minutes after its occurrence had been given a general description of the suspect who ran down the alley from the Club. The defendant's clothing generally fit the description. Accordingly, the arresting officers had reasonable cause to believe defendant had committed a felony not only because of his appearance, but due to his location and the time

he was found. An officer may arrest without a warrant for a felony, not committed in his presence, when the officer has reasonable cause for believing the person arrested committed the felony. 22 O.S. 1961, § 196. We find the officers had reasonable cause to arrest defendant and conclude the arrest was lawful.

Secondly, defendant complains it was error not to suppress the results of the search without a warrant of the 1969 Pontiac parked near the Club. The State contends defendant had no standing to attack the legality of the search.

Officer Goodenough testified that he found and searched an empty 1969 Pontiac parked on Harvard streets near the Club. The officer examined the car and found finger prints, sunglasses and a traffic citation issued to Herman Wing along with the prints of S. E. Powell. Legal title to the automobile belonged to Miss Chipman. Defendant testified he had used the car on numerous occasions with the consent of the owner. Further, defendant testified he had secured the car with the owner's consent for the use of Powell on the night of the robbery. The implication from the State's evidence is that both defendant and Powell had used the car in arriving together at the robbery scene.

It is not necessary to have legal title to the premises searched or property seized to attack the legality of a search and seizure as a person has standing to challenge a search if he is a person aggrieved by an unlawful search. As stated in *Jones v. United States*, 362 U. S. 257 (1960):

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizuer directed at someone else." 362 U.S. at 261.

This Court has previously held that a mere passenger in an automobile belonging to another has standing to attack the legality of a search. *Watt v. State*, Okl.Cr., 487 P.2d 961 (1971). *Lawson v. State*, Okl.Cr., 484 P.2d 1337 (1971). *Thompson v. State*, Okl.Cr., 487 P.2d 737 (1971). As we stated in *Lindsey v. State*, Okl.Cr., 488 P.2d 935 (1971):

> "A person who is the victim of a search and seizure directed against him has standing to assert his rights protecting him against an unreasonable search and seizure, as it is not necessary to have legal title in the premises searched or property seized."

As explained in *Jones v. United States*, supra, and *Lindsey v. State*, supra, the State cannot seek to prove possession by defendant of items discovered in a search and then claim he has no standing to object to the search. In *Wattenburg v. United States*, 388 F.2d 854 (9th Cir. 1968), the defendants Wattenburg and Owens were charged with illegally cutting and stealing Christmas trees from the United States. Introduced into evidence were Christmas trees found in a search behind a lodge where Owens was a roomer. In ruling the trees inadmissible the court stated:

> "But, in any event, Owens did have standing to object to that search and seizure, not necessarily because of his status as a roomer at Hideaway Lodge, but because one of the essential facts the Government sought to prove against Owens was that he was a joint possessor of the Christmas trees. See *Jones v. United States*, 362 U.S. 257, 263-264, 80 S. Ct. 725, 4 L.Ed. 2d 697; *United States v. Jeffers*, 342 U.S. 48, 52 72 S.Ct. 93, 96 L.Ed. 59."

In the instant case the State sought to prove the finger prints, sunglasses and traffic ticket in the car belonged to defendant. The implication to the jury was that defendant and Powell had both been in possession of the car and

used it in arriving at the scene of the robbery. Accordingly, since the State sought to prove defendant's possession of the items taken from the search, he was a person aggrieved by the search directed against him and he had standing to attack the legality of the search.

As to the legality of the search, we find no theory to support it as lawful. There was no warrant and no compelling reasons for non-procurement. The items were not in clear view. Since the arrest and search were not contemporaneous, the search was not incident to the arrest. The search was not lawful as a proper inventory of property legally taken into custody. Nor was the car evidence abandoned at the scene of the crime. The officers had ample opportunity to secure a warrant as required by law and failed to do so. Accordingly, the search was unlawful and its fruits inadmissible.

However, the fruits of the search challenged by defendant did not constitute a material, vital, or essential part of the evidence incriminating the defendant. They were matters of a collateral nature. This evidence was not so prejudicial that it "fatally infected" the conviction and its exclusion from consideration would not have effected the verdict. Therefore, although admission of the fruits of the search was error it did not fatally infect the conviction and is thus harmless error which does not require reversal of the conviction.

Defendant further cites as error the trial court's failure to suppress the prison hospital record showing defendant's blood type claiming a violation of the hearsay prohibition. Evidence is hearsay when its force depends on the competency and credibility of some person other than the witness; and statements otherwise objectionably as hearsay are not admissible because they have been reduced to writing. *In re Porters' Estate*, 208 Okl. Cr. 475, 257 P.2d 517. *Shaw v. State*, 76 Okl.Cr. 271, 301, 134 P.2d 999 (1943).

kept by public officers may be received in evidence. 12 O.S. 1961, § 502. However, writings of public officials are admissible in evidence only where statutes expressly requires that such writings be made. *Weeks v. State*, 88 Okl. Cr. 291, 202 P.2d 1005 (1949). There must be express statutory authority to compile the report or writing. *Steel v. Johnson*, 115 P.2d 145. Further as we stated in *Lawson v. State*, Okl.Cr., 486 P.2d 759, 762 (1971): "It is the rule in this jurisdiction that records made by public officials pursuant to their duties, based entirely on hearsay, are not admissible in evidence to prove any fact disclosed therein."

The State called as a rebuttal witness Mr. William Arnold, administrator of the Oklahoma State Penitentiary Hospital, to identify a hospital kept record for H. E. Wing showing his blood type. Mr. Arnold testified he did not know who made the actual blood type test or recorded it on the hospital record. We are of the opinion that this was hearsay evidence. We have not been advised, nor are we aware, of any statute requiring the keeping of a record at the Oklahoma State Penitentiary Hospital of an inmate's blood type. Thus it is not admissible as a writing required by statute to be kept by a public official. It is readily apparent the information contained in the hospital record was not first hand knowledge of the witness. Accordingly, the penitentiary hospital record was inadmissible as hearsay and the trial court's admitting same over objection was error.

Errors must never be disregarded lightly even though not substantial in nature. However, in view of the total evidence we do not think that this was a close case where this bit of evidence would have turned the tide and caused the jury to return a verdict of guilty. The reasonable effect of the hospital report was to repute defendant's theory that the blood on his clothing at the time of his arrest resulted from injuries to him by the police during the arrest. This was not a substantial part of the evidence estab-

lishing the crime, defendant's identity, or placing him at the scene of the crime. It is to be remembered that two witnesses identified defendant as one of the robbers. Therefore, excluding the hospital report from evidence would not, in our opinion, have changed or influenced the jury's finding of guilt.

It is defendant's further assignment that the trial court erred in denying his pre-trial motion for inspection and production of evidence in the State's possession. Defendant's motion requested that State furnish defendant with any scientific tests and results made in connection with this particular case, specifically of items taken from defendant's person on his car. The motion was filed on January 30 and denied on February 23 as the trial began.

Defendant argues that pre-trial discovery is desirable and criticizes the so-called "sporting theory" in a trial. We share the view expressed in the American Bar Association's Standards Relating To Discovery and Procedure Before Trial, Section 1.2:

> "In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, the adversary system, and national security."

As to pre-trial discovery and inspection of articles in the possession of prosecuting authorities, this Court has held there should be disclosure of technical reports,[1] an alleged death weapon with reports concerning same,[2] defendant's statement to police,[3] a record of prior criminal

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1. **Sadler v. Lackey**, Okl.Cr., 319 P.2d 610.
2. **Doakes v. District Court**, Okl.Cr., 447 P.2d 461 (1968).
3. **id.**

convictions of intended witnesses,[4] and material which tends to negate the defendant's guilt or that would tend to reduce his punishment.[5] This is not to say the defense is entitled to an aimless "fishing expedition," and we have denied inspection of a prosecutor's work product[6] or a detective's personal notes not subject to introduction into evidence.[7]

A criminal trial is not a game of hide and seek, and we are committed to the concept of full pre-trial discovery where reasonable and practical. However, in the case at bar defendant has not sustained his burden of proof showing a prejudicial denial of pre-trial inspection of items in the possession of the State. Defendant's motion was general in terms, and he has not shown any material prejudice or injury resulting from the denial. Defendant did not ask for a continuance on the basis of the denial of inspection, nor did he seek an extraordinary writ before trial. See *Doakes v. District Court*, supra. We will not reverse a conviction on the mere speculation that a denied pre-trial inspection and disclosure might have been helpful to the defendant. See *Stevenson v. State*, supra.

Finally, defendant argues the evidence does not prove he personally robbed Oakley as charged, but rather that S. E. Powell robbed Oakley. We find no merit to this contention since the evidence indicates that defendant and Powell jointly committed the armed robbery at the Harvard Bridge Club during which Oakley was robbed. All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, are punishable as principles. 21 O.S. 1961, 172.

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4. **Stevenson v. State**, Okl.Cr., 486 P.2d 646 (1971).
5. id.
6. **Shapard v. State**, Okl.Cr., 437 P.2d 565 (1967)
7. **Smith v. State**, Okl.Cr., 462 P.2d 328 (1969).

We therefore conclude there are no errors requiring reversal of the conviction. There are, however, errors set out above as well as inflamatory remarks of the prosecutor during argument which, in the interest of justice, require modification of the sentence imposed. Accordingly, the sentence of one hundred and five (105) years imprisonment is modified to a term of forty-five (45) years, and as so MODIFIED the judgment and sentence is hereby AFFIRMED.

APPENDIX B

IN THE DISTRICT COURT WITHIN AND FOR
TULSA COUNTY,
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,
Plaintiff,

vs.

HERMAN EUGENE WING,
Defendant.

MOTION FOR INSPECTION

Comes now the defendant and moves the Court to require the State of Oklahoma to furnish said defendant with all or any scientific tests or experiments made and the results of laboratory analysis made in connection with this particular case and specifically to any clothing, tools, or any other items of personalty taken from the car of the defendant and/or the person of the defendant pursuant to the arrest and search, of said defendant and also the results of any evidence seized at the scene of the crime in the above entitled cause and any scientific tests or experiments made and results of any laboratory analysis made with reference to the evidence seized on or about the location of the scene of the crime in the above entitled cause which results are within the possession, custody and control of the State of Oklahoma, the existence is known or by the exercise of due dilligence may become known to the attorney for the State of Oklahoma.

MOTION FOR THE PRODUCTION OF EVIDENCE

Comes now the defendant, Herman Eugene Wing, and moves the Court for an order requiring the plaintiff, The State of Oklahoma, to produce all evidence favorable to the accused in order that the defendant may properly prepare his defense in the above entitled cause so that the rights afforded the defendant be protected as shown in Article Two, Section Seven of the Constitution of the State of Oklahoma and the Fourteenth Amendment of the Constitution of the United States of America.

GARRISON & HANLON

Attorneys for Defendant

By: Paul E. Garrison